87-1183

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CELOTEX CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; OWENS-CORNING FIBERGLASS CORPORATION; KEENE CORPORATION; H. K. PORTER COMPANY, INC.; FIBREBOARD CORPORATION,

Petitioners,

v.

WILEY GOAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Do the Due Process and Full Faith and Credit clauses of the Federal Constitution preclude application of Texas' cause of action accrual rule in this diversity action under Texas *lex fori* conflicts decisions when the only contacts between Texas and the parties or the litigation are that the action was originally filed in Texas, and that the petitioners are registered to do business and have appointed agents for service of process in Texas?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceedings in the Fourth Circuit Court of Appeals whose judgment is sought to be reviewed in this Court.

The Celotex Corporation, a party to this appeal, is a subsidiary of the Jim Walter Corporation, a publicly owned corporation. Although the Jim Walter Corporation is not a party to this appeal, it does have a financial interest in the outcome of this case.

Eagle-Picher Industries, Inc., a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

The Owens-Corning Fiberglass Corporation, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

The Keene Corporation, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

The H. K. Porter Company, Inc., a party to this appeal, is an affiliate of Fansteel Inc., a publicly owned corporation. Fansteel, Inc. is not a party to this appeal, and does not have a financial interest in the outcome.

The Fibreboard Corporation, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Celotex Corporation, Eagle-Picher Industries, Inc. Owens-Corning Fiberglass Corporation, Keene Corporation, H. K. Porter Company, Inc., and Fibreboard Corporation, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit issued October 16, 1987.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is published at 831 F.2d 508 and appears in the Appendix at A-1. The Opinions of the United States District

Court for the Western District of Virginia appear in the Appendix at A-11 and A-13.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered October 16, 1987, affirms the order of the District Court. This petition for certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the Constitution provides, in pertinent part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

Article IV § 1 of the Constitution provides:

> Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial proceedings of every other state.

28 U.S.C. § 1404(a) provides:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

Plaintiffs Wiley F. Goad and Nomia Goad,[1] Virginia citizens and residents, initiated this diversity action November 16, 1984, in the United States District Court for the Eastern

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[1]Nomia Goad's only claim is for loss of consortium. That claim, all parties concede, is not maintainable under Virginia law.

District of Texas, Paris Division, seeking recovery from certain manufacturers of asbestos-containing products. Wiley Goad allegedly sustained injury in the course of employment as an insulator working for various employers over a period of about 23 years. Plaintiff is, and has been at all relevant times, a citizen and resident of Virginia. He has never lived, worked or sought medical care in Texas. His treating physicians are located in Virginia. He does not claim the asbestos products he was exposed to were manufactured, sold, or shipped from Texas.

Venue for the action in Texas was based on licensing of the defendants to do business in Texas and the presence of agents for the service of process in the district where suit was instituted.[2] After this action was filed, the defendants moved pursuant to 28 U.S.C. § 1404(a) for transfer of this case to Virginia upon a showing that all of the significant contacts in this case were in Virginia, that Virginia law controls the liability of the defendants, and that plaintiff, his treating physicians and most of the witnesses were located in Virginia. Over plaintiff's objections, the Texas court, in March 1984, transferred this action to the United States District court for the Western District of Virginia, Roanoke Division.

Petitioners believe plaintiff's claim is barred by Virginia's statue of limitations. Respondent believes the claim is not barred if the Texas statute of limitations is applied, since Texas uses a "discovery" accrual rule rather that the "date of injury" rule employed by Virginia.[3] In December, 1985,

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[2]Texas, like most states, requires a foreign corporation which wishes to do business in Texas to register and appoint a local agent for service of process. None of the petitioners are Texas corporations and none of the petitioners have their principal place of business in Texas.

[3]Compare *Locke* v. *Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981) (Two year Virginia Statute of Limitations starts to run with occurrence of physical changes due to exposure regardless of whether changes are discovered at the time) with *Fusco* v. *Johns-Manville Products Corp.*, 643 F.2d 1181 (5th Cir. 1981) (Under Texas Law, two year statute of limitations does not start to run until plaintiff discovered, or should have discovered, the existence of injury). For purposes of proceedings on the issue of whether Texas' statute of limitations and accrual rules may be applied, the parties agree that this claim is time barred under Virginia's "injury" rule but not under Texas' "discovery" rule.

plaintiff filed a motion seeking a ruling that Texas' statute of limitations must be applied to this action.[4] Defendants opposed such a ruling as violating the Due Process and Full Faith and Credit provisions of the Federal Constitution for want of any contacts between Texas, the parties and the litigation other than defendants' statutorily required presence in Texas.[5] The trial court granted plaintiff's motion, adopting by reference an unpublished decision from the Northern District of Alabama[6], which essentially held that the constitutional limitations upon choice of laws decisions in diversity cases articulated in *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302 (1981), were inapplicable to a forum court's decision to apply its own statutes of limitations classified under state law as "procedural" rather than "substantive". (A. 19). The Alabama court also held that the ruling in *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1953) established that an application by a forum of its statute of limitations to an action which would be barred in the state where the claim arose did not violate the Full Faith and Credit Clause. (A. 18).

On February 20, 1986, the trial court reaffirmed its prior grant of plaintiff's motion, but granted defendants' request that it certify the question for interlocutory appeal.

The Fourth Circuit Court of Appeals granted defendants' Petition for Permission to Appeal, and on October 16, 1987, issued its opinion affirming the District Court's ruling. The Court's analysis began with a recognition of the great age and dignity of the label-based conflicts rule followed by Texas, and a review of the formulae used for choosing the label in this instance. The Fourth Circuit then imposed a constitutional gloss on the procedure/substance distinction and ruled that because the limitations rules at issue are "procedural"

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[4]The parties agree that the rights, obligations, and liability of the parties are governed by Virginia, not Texas, law.

[5]As the court below correctly observed, the business conducted by defendants in Texas did not create any contact between this litigation and Texas. (A. 4., fn7)

[6]*Asbestos Litigation Transfers From Northern District of Texas Applicability of Texas Statute of Limitations* (J. Hand, S.D. Alabama, 1/3/86). This unpublished opinion is reproduced in the Appendix beginning at A. 15.

rather than "substantive", their application or non-application is not subject to constitutional limitations. (A. 4-6). Specifically, the Fourth Circuit concluded that state statutes of limitations, unlike statutes of repose, merely express the policy of the state in regulating the availability of remedies and do not affect any rights or interests entitled to constitutional protection. (A. 5-6). Having thus assigned constitutional significance to the state law procedural/substantive distinction between statutes of limitation and statutes of repose, the court went on to analyze the Full Faith and Credit and Due Process issues separately. The court held first that a forum's decision to apply its statutes of limitation is in all cases exempt from any challenge of violation of the Full Faith and Credit Clause under *Wells*. (A. 6).

The Fourth Circuit treated the procedure/substance distinction as dispositive also of the due process argument, holding that the constitutional limitations on choice of law decisions articulated in *Hague* are expressly limited to the choice of laws classified as "substantive" for state choice of laws purposes. (A. 8). While conceding that there were no contacts between Texas and this litigation, the court nonetheless held that the fact defendants maintained a registered office in Texas, coupled with the long history of the conflicts rule providing for application of a forum state's statute of limitations, precluded any due process challenge because defendants could not claim to be unfairly surprised by application of the rule if sued in Texas. (A. 9).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The exponential proliferation, in recent years, of suits filed in states with no discernible connection with the litigation, for the sole purpose of breathing new life into stale claims from other jurisdictions, threatens to undermine the status of states as co-equal sovereigns in a federal system and the values of fairness protected by the Full Faith and Credit and Due

Process Clauses of the Constitution. The threat arises not from the resourcefulness of the lawyers filing the suits, nor from any perceived failure of state legislatures to outlaw the practice.

The threat lies in the unchecked application of an ancient rule of conflicts law, whose sole point of reference is a labelling system, to decisions which determine the outcome of the litigation. This rule permits a forum to apply its own limitations rules unless the jurisdiction whose law otherwise governs the merits of the cause prescribes a limitation deemed "substantive", rather than "procedural". This determination is, in turn, based upon the forum's application of ancient formulae which look solely to the manner in which the foreign limitation is expressed in its law. No other aspect of the litigation, no factors bearing on the forum's interest in the outcome of the litigation, no aspect of the behavior of the parties, nor any consideration of the practical relationship between the foreign limitation and the claims to which it applies,[7] are considered relevant to the labelling process.

The rule of decision fails to consider the balance between the interests of co-equal sovereigns in our federal system and is only concerned with arbitrariness in terms of the internal consistency of the forum's selection of labels. The explosive surge in exploitation of this rule for the specific purpose of circumventing state policy has increased both the importance of confronting this insensitivity and the urgency for this court to determine the extent to which Full Faith and Credit and Due Process limit a forum's use of this rule to allow maintenance of a stale foreign claim.

This court has held that Full Faith and Credit does not compel a forum to apply the foreign statute of limitations to a foreign cause of action where the forum statute bars the action

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[7]In a state choice of law setting, both the courts and commentators have increasingly criticized the use of the procedure/substance classification in choosing limitations rules precisely because that distinction is inherently insensitive to the interests necessarily expressed in limitations rules. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1986 REVISIONS); Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. St. L.J. 1.

but the foreign statue would not. *M'Elmoyle* v. *Cohen*, 10 U.S. (13 Pet.) 312 (1839), (limitation on enforcement of foreign judgment). *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1952) (limitation on wrongful death claims). Only a few years before *Wells*, however, this Court pointed out that a forum's application of its own limitations rules to allow maintenance of a claim which would be time-barred in the state where it arose presents a distinctly different situation, in which the Full Faith and Credit clause is a "limitation voluntarily imposed, by the people of the United States, upon the sovereignty of their respective states in applying the law of the forum." *United Commercial Travelers* v. *Wolfe*, 331 U.S. 586, 607 (1947). In none of these cases, nor in any other case, has this court determined what limitations Full Faith and Credit imposes on the sovereignty of a state applying its own law to revive a stale foreign claim.

The fundamental arbitrariness inherent in permitting the life of a state-created right of action to be entirely controlled by the fortuitous circumstances which determine whether jurisdiction can be obtained over a defendant in some other state[8] is a proper concern of Due Process. No decision of this court has confronted or addressed the due process ramifications of a forum's application of its own limitations rules to resuscitate a foreign claim based solely on the forum's classification of the foreign limitations as "procedural". In fact, this Court has indicated recently that the degree of due process concern raised by such a decision remains an open question. *Keeton* v. *Hustler Magazine, Inc.* 465 U.S. 770, 778 n. 10 (1984). The

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[8](See *Wells*, 345 U.S. 522 (Jackson, J., dissenting, joined by Black and Minton, JJ.). The Fourth Circuit seemed to assume that only defendants are affected by this arbitrariness. Consider, however, the case of two plaintiffs identically situated but for the fact that one has the good fortune to have been injured by a defendant licensed to do business in both the place of injury and a forum with a *lex fori* conflicts rule applicable to limitations periods and a limitations period longer than that of the state where the injury occurred. In such a case, one plaintiff's claim will have a longer life than the other even though in all other respects the same law is applicable to both claims.

Court's refusal to comment on this point in *Keeton* clearly expressed its intent that *Keeton* not be read as endorsing use of the procrustean procedure/substance distinction in choosing statutes of limitation.

In *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985) and *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302 (1981), this Court adopted the view that due process and full faith and credit considerations combine to require a significant contact or aggregate of contacts between the jurisdiction whose law is to govern the outcome of the litigation and the parties and the dispute. Neither case dealt with a decision as to what statute of limitations would be applied. Neither decision suggested, however, that reverence for ancient formulations requires a different analysis of the constitutional limitations on a forum's decision to apply its own statute of limitations merely because the forum classifies the statute as procedural. Uncritical application of labels and contrived semantic distinctions have never been permitted to dictate the parameters of constitutional doctrine. Neither *Hague* nor *Shutts* suggests that there is any principled reason for allowing state law labels to control constitutional analysis in the choice of laws setting.

Logic and common sense compel recognition that statutes of limitations and accrual rules not exist in a vacuum. They govern the inception and life span of rights of action. They create affirmative defenses which, like other defenses provided by state law, defeat the assertion of a right. No affirmative policy of a forum without contacts of sufficient significance to create an interest in the outcome of a stale foreign claim is served by application of the forum's statutes to allow maintenance of the claim. To permit the forum to do so, however, allows the policy of the foreign jurisdiction to be arbitrarily and selectively ignored. The aura of infallibility and the patina of long usage acquired over time by the conflicts rule which allows such a result must not be allowed to shield the results of its application from constitutional scrutiny. This Court has never shied from confronting and correcting the mischief caused by substituting labels for reasoned constitutional analysis, and it should not now do so.

II. THE OPINION BELOW DIRECTLY AND IRRECONCILABLY CONFLICTS WITH THE DECISION OF THE THIRD CIRCUIT IN *FERENS V. DEERE & CO.*

The opinion of the Fourth Circuit is in direct conflict with the decision of the Third Circuit Court of Appeals in *Ferens v. Deere & Co.*, 819 F.2d 423 (3rd Cir. 1987), *cert. applied for*, No. 87-477. In *Ferens*, the Third Circuit ruled a Pennsylvania District Court could not constitutionally apply the Mississippi statute of limitations in a diversity case transferred to Pennsylvania from Mississippi pursuant to 28 U.S.C. 1404(a). *Id.* at 427. In so ruling the Third Circuit explicitly held that the constitutional limitations articulated in *Allstate Ins. Co. v. Hague*, applied to a forum's decision to apply its own statute of limitations. *Ferens*, 819 F.2d at 427. The Third Circuit correctly followed Justice Brennan's characterization, in *Allstate*, of *Home Ins. Co.* v. *Dick*, 281 U.S. 397 (1930) as standing for the proposition that

> . . . if a state has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional. *Dick* concluded that nominal residence—standing alone—is inadequate . . .

Ferens, 819 F.2d at 427.

Finding that the only contact between the defendant and the original forum was the defendant's qualification to do business in the original forum and appointment of local agents for the service of process, the court held that Full Faith and Credit and Due Process precluded application of the Mississippi statute of limitations.

No principled factual distinction which would reconcile the conflicting decisions of the Third and Fourth Circuits is possible. The Fourth Circuit has flatly held that Due Process and Full Faith and Credit do not limit a forum's application of its own statutes of limitations so long as the limitations are classified as procedural rather than substantive. The Third Circuit has ignored any distinction between procedural and substantive limitation rules and held that the choice of limita-

tions is subject to the constitutional limitation imposed by the Full Faith and Credit and Due Process Clauses articulated in *Dick* and *Allstate*.[9] *See Id.* at 427. In short, the Fourth Circuit subordinates constitutional analysis to the application of state law labels, while the Third Circuit focuses directly on the constitutional dimension of the choice of law decision.

In *McVicar v. Standard Insulators, Inc.*, 824 F.2d 920 (11th Cir. 1987) and *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979) both courts of appeals held that a district court in a diversity action originally filed elsewhere and transferred pursuant to 28 U.S.C. § 1404(a) must apply the same statute of limitations that would have been applied by the transferor court under the transferor forum's choice of law rules. In both cases, the courts found, as a matter of state law, that the transferor forum (Mississippi in both cases) would apply its own statutes of limitations. Neither opinion expressed any view on constitutional issues decided in *Ferens* and the present case, nor does review of the circuit court opinions suggest that any party challenged application of the forum's statute of limitations on constitutional grounds. Although these two cases provide no authority for the position taken by the Fourth Circuit, they do illustrate the extent of divergence among the circuits. This disarray, standing alone,

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[9]This court has recently granted certiorari in *Sun Oil Co. v. Wortman*, No 87-352, to review, *inter alia*, the Kansas Supreme Court's summary disposition of a constitutional challenge to application of Kansas' general statute of limitations on the grounds that the statute is procedural and that *Phillips Petroleum Co. v. Shutts* only limits choice of the forum's "substantive" law. The grant of certiorari in *Sun Oil*, which presents the same issue presented by this case in a very difficult factual and procedural setting, should not be allowed to dissuade the Court from granting certiorari in the instant case. Rather, the present case offers the court the rare opportunity to resolve an important constitutional question and elucidate that resolution in two vastly differing settings. *Sun Oil* presents the issue in the context of a class action in which one of the class representatives and a very small percentage of the class members are Kansas residents. In this diversity case, a single plaintiff with no connection whatsoever with Texas, seeks to avoid the policies of his home state by invoking Texas law. The factors bearing on the constitutional analysis are thus significantly different, even though the underlying question of the impact of the procedure/substantive distinctions on the constitutional analysis is the same.

creates a conflict which undermines uniformity within the federal system and which can only be resolved by exercise of this court's discretion to grant certiorari in this case.

III. THE CIRCUIT COURT OPINION BELOW MISAPPLIES AND IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Although the precise questions presented in this case have never been resolved by this Court, the Fourth Circuit's analytical approach conflicts with prior opinions of this Court on every significant point. The opinion below treats the validity of the procedural classification of the accrual rules under state conflicts law as dispositive of all constitutional issues. It bases its conclusion that this classification is of constitutional significance principally upon *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945) and *Campbell v. Holt*, 115 U.S. 620 (1885) in which this Court dealt with due process challenges to retroactive applications of statutes which effectively removed the bar of the statute of limitations. Neither of these cases considered or discussed the core issue in choice of law decisions, the conflict between the policies of two states as expressed through their laws.[10]

Both the deference to state law classification and the reliance upon case law dealing with statutes of limitations in contexts other than the choice of law setting have been expressly disapproved in prior decisions of this Court. In keeping with Justice Holmes' observation in his opinion in *Davis* v. *Mills*, 194 U.S. 451, 457 (1904) that "constitutions

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[10] *Campbell* and *Donaldson* cannot, in any event, be relied upon as stating Virginia's view of the character of its statutes of limitations. The Virginia General Assembly responded to the holding in *Campbell* v. *Holt* by enacting a statute precluding the repeal of a statute of limitations from reviving actions barred under prior law. This statute has remained a part of Virginia law for one hundred years and is still the law. Va. Code §8.01–243 (1977) (prior history: §8–36, Code 1950; §5829, Code 1919; §2936, Code 1887.) This statute was passed specifically to reflect Virginia's disagreement, as a matter of state policy, with *Campbell*. *Kesterson* v. *Hill*, 101 Va. 739, 45 S.E. 288 (1903).

are intended to preserve practical and substantial rights, not to maintain theories" this Court has consistently refused to allow state law classifications to foreclose constitutional scrutiny. *See* e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945); *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 181–83 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397, 405–06 (1930).

The Court has further expressly disapproved of reliance upon, and resort to, characterizations of the nature of statutes of limitations in any setting other than the setting under consideration. *See York*, 326 U.S. at 108–09. The mischief that can result from ignoring this precept pervades the lower Court's opinion. The distinction between matters affecting the remedy and matters affecting the right has indeed been significant in the context of constitutional limitations on the retroactive application of statutes of limitations. In the realm of constitutional limitations on a forum's application of its own law to a dispute involving rights created in another jurisdiction, however, this Court has repeatedly declined to attribute any such significance to this distinction. *See, eg., Yates*, 299 U.S. at 181–83; *Dick*, 281 U.S. at 405–06. Indeed, the case relied upon by the lower court to dispose of petitioner's Full Faith and Credit claim explicitly held that such distinctions, as applied to statutes of limitations, are wholly irrelevant to constitutional analysis. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518 (1952).[11]

Setting aside the lower court's unjustifiably narrow reading of *Allstate Ins. Co.* v. *Hague* as having application only where a choice of law decision involves application of laws the state classifies as "substantive", the lower court's analysis of the full Faith and Credit and Due Process considerations is in direct conflict with the approach adopted by this court in *Hague* and applied in *Phillips Petroleum Co.* v. *Shutts*. In *Hague* seven of the eight justices agreed that Full Faith and Credit and Due Process considerations were co-extensive in

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[11] "Differences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause." *Wells*, 345 U.S. at 518.

precluding application of the forum's law where the forum has no significant contact or significant aggregate of contacts with the parties and the litigation. *Id.* 449 U.S. at 312–13, 332. By bifurcating the analysis, the lower court appears to have adopted the approach Justice Stevens advocated in *Hague* and *Phillips*. This approach analyzes Due Process and Full Faith and Credit separately to determine whether the forum is prohibited from applying its own law or compelled to apply foreign law. *See Hague*, 449 U.S. at 320–32 (Stevens, J., concurring). The lower court gives no justification for the inconsistency in holding *Hague* inapplicable, while adopting the analysis Justice Stevens advocated and applied in *Hague*.

The lower court's holding that Petitioner's mere presence in the state of Texas for the purpose of transacting business is sufficient to satisfy any constitutional limitations on the choice of the forum's law is directly contrary to Justice Brennan's decision in *Hague*. *See id.* at 310–11. The court's rationale for ignoring this Court's view that nominal residence is insufficient, is apparently based on the notion that, if there are sufficient contacts to support venue and jurisdiction, then the constitution will require nothing more to support application of the forum statute of limitations. The opinions of this Court provide no support for this notion and the lower court cites no authority for its view.

At each turn in its convoluted attempts to justify the subordination of federal constitutional concerns to Texas' labelling of Virginia's accrual rule, the lower court has either ignored or misapplied the teaching of relevant decisions of this court. The resulting distortion of this Court's holdings, standing alone, is sufficient to warrant granting certiorari in this case.

CONCLUSION

For the foregoing reasons, the petitioners respectfully submit that a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Fourth Circuit rendered on October 16, 1987.

Respectfully submitted.

CELOTEX CORPORATION
EAGLE-PICHER INDUSTRIES, INC.
OWENS-CORNING FIBERGLASS
CORPORATON
KEENE CORPORATION
H. K. PORTER COMPANY, INC.
FIBREBOARD CORPORATION

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APPENDIX

PUBLISHED
(831 F.2d 508)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3540

WILEY GOAD,

Plaintiff/Appellee,

and

NOMIA GOAD,

Plaintiff,

versus

CELOTEX CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; OWENS-CORNING FIBERGLASS CORPORATION; KEENE CORPORATION; H. K. PORTER COMPANY, INC.; FIBREBOARD CORPORATION,

Defendant/Appellant,

and

JOHNS MANVILLE SALES CORPORATION; ARMSTRONG CORK COMPANY; GAF CORPORATION; UNARCO INDUSTRIES, INC.; PITTSBURGH CORNING CORPORATION; OWENS-ILLINOIS, INC.; FORTY-EIGHT INSULATIONS, INC.; MUNDET CORK CORPORATION; CROWN CORK & SEAL COMPANY, INC.; RAYBESTOS-MANHATTAN, INC.,

Defendant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Jackson L. Kiser, District Judge. (CA 84-500-R)

Argued January 8, 1987 Decided October 16, 1987

Before WIDENER and HALL, Circuit Judges, and SENTELLE, United States District Judge for the Western District of North Carolina, sitting by designation.

Archibald Wallace, III (Nathan H. Smith; Allan M. Heyward, Jr.; Sands, Anderson, Marks & Miller, on brief) for Appellants; Charles Alan Wright (Robert R. Hatten; Patten, Wornom & Watkins; Richard S. Glasser; Glasser & Glasser; Joel I. Klein; Richard G. Taranto; Onek, Klein & Farr; Gary Wheeler Kendall; Michie, Hamlett, Donato & Lowry, on brief) for Appellee.

WIDENER, Circuit Judge:

The defendants in this case, manufacturers of asbestos products, brought this interlocutory appeal from the decision of the district court granting the plaintiffs' motion to apply the Texas statute of limitations to this action. We affirm the order of the district court.

The plaintiffs, Wiley and Nomia Goad, instituted this diversity action in federal district court for the Eastern District of Texas, seeking recovery for injuries sustained by Wiley Goad from exposure to the defendants' products. Goad worked as an insulator for more than 20 years, and he claims to have been exposed to asbestos in at least seven eastern states,[1] plus the District of Columbia. He has never worked in Texas, and is a resident of Virginia. Upon learning of Goad's injuries, the Goads brought suit in the Texas federal district court. Texas applies what is called the discovery rule to actions for personal injury, so that a cause of action does not accrue until a person knows or reasonably could become aware of his injury. Plaintiffs conceive that, had this action been brought in Virginia, it would have a better chance to be barred, since the applicable Virginia statute did not embrace a discovery rule until 1985.[2] We need not decide that question, however. All of the defendants have marketed their products in Texas, and there is no question that they are all subject to personal jurisdiction in Texas. In addition, venue was proper under 28 U.S.C. § 1391(c).[3] Nevertheless, the case was transferred, over plaintiffs' objection, to the Western District of Virginia under 28 U.S.C. § 1404(a), which permits transfers "[f]or the convenience of parties and witnesses, in the interest of justice."

Upon the transfer from Texas to Virginia, plaintiffs filed their motion, asking that the district court apply the Texas

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[1]Goad claims to have been exposed to asbestos in Virginia, West Virginia, North Carolina, Ohio, Kentucky, Maryland and Tennessee.

[2]Va. Code § 8.01-249(4); but cf. *Locke v. Johns-Manville Corp.* 221 Va. 921, 275 S.E.2d 900 (1981).

[3]28 U.S.C. § 1391(c) provides that venue for a corporation is proper in any district "in which it is incorporated or licensed to do business or is doing business. . . ."

statute of limitations. The district judge granted the motion, and defendants appeal that order.

In arguing that the Virginia statute ought to apply to this action, rather than the Texas statute, defendants' maintain that both the due process clause of the Fourteenth Amendment and the full faith and credit clause[4] require that *every* choice of law decision made by a state court be supported by "significant contacts" between the litigation and the state whose law is chosen. Their position is in direct opposition to the traditional rule that, in considering the appropriate statute of limitations in a case such as this, the law of the forum applies. The defendants assert that the precise question in this case, the constitutionality of what defendants call a contactless forum state's application of its own longer statute of limitations, has never been addressed by the Supreme Court. However, they say a recent Supreme Court case has cast doubt upon the traditional rule, and they urge us to find that the choice of Texas' statute of limitations in this case violates the federal Constitution. For the reasons set forth below, we find the defendants' argument to be without merit.

Aside from the defendants' constitutional claim, there is no dispute but that the Texas statute of limitations applies to this action. The case was filed in a federal district court in Texas, where both personal jurisdiction and venue were proper. Subject-matter jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332. The district court in Texas was then obliged to make the same choice of law as would a Texas state court, *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), including the choice of a statute of limitations. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). When venue was transferred to the Western District of Virginia, the district court in Virginia was obliged to apply the same law that would have been applied by the Texas district court; only a change of courtrooms was effected. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).[5] Since the Texas state courts would apply

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[4]United States Constitution, Art. IV, § 1.

[5]*Van Dusen* held that a change of venue under 28 U.S.C. § 1404(a) would not alter the applicable law in a case.

Texas' own statute of limitations to this action,[6] under the traditional rule that the law of the forum applies to matters of procedure, the federal court in Virginia was required to apply the Texas statute.

Defendants do not contest the correctness of the preceding analysis, nor do they challenge the continuing vitality of the cases supporting it. Therefore, defendants' claim resolves itself to the proposition that the federal Constitution would prohibit a Texas state court from applying Texas' statute of limitations to this action.[7] We think defendants' arguments, however, rest on a fundamental misunderstanding of the nature of statutes of limitation.

Statutes of limitation represent a public policy judgment by a State as to the time at which an action becomes too stale to proceed in its courts. States rightly may be concerned about the prosecution of fraudulent claims and reliability of judgments rendered upon old claims, where memories may have faded, witnesses may have died, and evidence may have been lost. It has also been said that statutes of limitation also serve the interest of allowing defendants to rest assured that, after a certain period of time, their exposure to liability has ended. See, e.g., *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 118–19 (D.C. Cir. 1982). It is felt, and we agree, that the principal purpose of limiting statutes is the prevention of stale claims, and that the repose of defendants is merely an incidental benefit of such statutes. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Statutes of limitation, then, are primarily instruments of public policy and of court

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[6]See, e.g., *California v. Copus*, 158 Tex. 196, 309 S.W.2d 227, cert. denied, 356 U.S. 967 (1958). Neither *Klaxon* nor *Guaranty Trust* relied upon a substantive/procedural distinction but squarely upon *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Texas court did follow that distinction, but that is not material here. What is material is that the Texas courts would have applied the Texas statute of limitations.

[7]Their brief, p. 4, admits this much, although the factual premise in the brief, p. 28, is not accurate in that it assumes, contrary to the record, that the *defendants* had no significant contact with the Texas forum. The defendants' contacts with Texas were not only significant; they must be assumed to be in vast numbers. It is true, however, that this particular litigation has no contact with the Texas forum.

management, and do not confer upon defendants any right to be free from liability,[8] although this may be their effect.[9]

In contrast to statutes of limitation, statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago. Statutes of repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action. See, e.g., *Bolick v. American Barmaq Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982). In other words, where a statute of repose has been enacted, the time for filing suit is engrafted onto a substantive right created by law. The distinction between statutes of limitation and statutes of repose corresponds to the distinction between procedural and substantive laws. Statutes of repose are meant to be "a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights." *Bolick*, 293 S.E.2d at 418, quoting Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad*, 16 U.Rich.L.Rev. 323, 334 n. 38 (1982). Statutes of limitation serve interests peculiar to the forum, and are considered as going to the remedy and not the fundamental right itself. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).[10] Virginia treats its relevant statute of limitations as bearing on the remedy and not on the plaintiff's right itself. *Burk's Pleading and Practice*, § 231 (1952).

"'[Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is now called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.'" *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

[8]Of course, where the discovery rule is in effect, the argument that the statute ensures anyone's repose is at least of less force.

[9]The Supreme Court has adopted the view that statutes of limitation go to remedies rather than rights in *Campbell v. Holt*, 115 U.S. 620 (1885), and declined, in *Chase Securities*, to overrule *Campbell*. Of particular interest here is that in *Chase Securities* the Court rejected a Fourteenth Amendment challenge based on retroactivity, when Minnesota had retroactively given new life to a cause of action presently barred by a statute of limitations.

Contrary to defendants' assertion, this distinction does not exalt form over substance, nor does it subject the Constitution to the whims of the States in labeling their laws. Certainly, the labels applied by States do not control the outcome of constitutional adjudication. But, as the Supreme Court has recognized, the labels serve a useful purpose in describing the various interests underlying the two types of laws. "The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." *Chase Securities Corp. v. Donaldson*, 325 U.S. at 314.

Procedural rules protect the interest of the courts in the reliability of judgments, and in managing the progress of cases before them. They express the public policy of the forum State in granting or denying access to its courts. Substantive laws reflect a State's determination of the proper relationship between the people and property within its boundaries. The States are not strangers to the use of statutes of repose as a means of protecting manufacturers from liability for remote acts. Viewed in this light, defendants' argument fails on both points.

Full Faith and Credit

There is no authority to support the theory that the full faith and credit clause limits the ability of a forum State to apply its own statute of limitations to a cause of action created by another State. To the contrary, the Court has explicitly decided and stated that ". . . the Full Faith and Credit Clause does not compel the forum state to use the period of limitations of a foreign state." *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953).

Since a statute of limitations serves primarily to protect the public policy of the forum State in not entertaining stale cases, we do not think that failure to apply the Virginia statute of limitations to this case impairs any interest of Virginia's. Virginia considers its relevant statute of limitations to be

procedural, and has not enacted a statute of repose to protect vendors of asbestos.[11] Defendants' brief invokes the spectre, or sets up the strawman, depending on whose ox is being gored, of forum-shopping,[12] and asserts that Texas has no interest in the application of her longer[13] statute of limitations, citing cases from States which, as a matter of policy, have abandoned the traditional conflicts rule for limitations.[14] These arguments miss the point, however. It is the proper concern of Texas as to what rules best advance her interests, and it is not our role to invalidate Texas' choice of law because we might feel that it will clog the Texas courts with unwanted litigation. The state cases cited by defendants are completely consistent with this rationale; those States have made their decisions and Texas has made hers. Whatever may be the

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[11]As noted, Virginia, however, in 1985, enacted a statute utilizing a kind of discovery rule for asbestos related injuries. Va. Code § 8.01-249(4) (1985). Prior to that, in 1981, the Virginia Court had held that, in an asbestos related cancer case, the statute of limitations started to run when the tumor appeared (when the injury occurred) rather than from the date of exposure. *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).

[12]There is nothing inherently evil about forum-shopping. The statutes giving effect to the diversity jurisdiction under the Constitution, 28 U.S.C. § 1332 (jurisdiction) and § 1391 (venue) are certainly implicit, if not explicit, approval of alternate forums for plaintiffs. For example, § 1391(a) provides a suit may be brought in the district where all of the plaintiffs or all the defendants reside, or where the cause of action arose; and § 1391(c) provides that a corporation may be sued in any district in which incorporated, or is licensed to do business, or is doing business. Thus, complaints about forum shopping expressly made possible by statute are properly addressed to Congress, not the courts. It would require but a short logical step to conclude that the present case is in reality an attack on the venue statutes, a point we do not consider because not raised in the briefs. In any event, we note that state borrowing statutes guard against forum shopping. But that, too, is a legislative matter, but for the States.

[13]The defendants recognize the interest of the forum state in application of a *shorter* statute of limitations, but assert that the result should be different when the forum state seeks to apply its *longer* statute. With respect, the logic of this argument escapes us.

[14]See, e.g., *Heavner v. Uniroyal, Inc.*, 62 N.J. 130, 305 A.2d 412 (1973) (statute of limitations of the State when the cause of action arises will be used if all parties are present and amenable to the jurisdiction of that State's courts).

merits of a significant contacts or other similar rule, with respect to limitations of actions, it is better addressed to state courts and legislatures.

Due Process

The defendants' due process claim must likewise fail. It is true that due process, like full faith and credit, puts certain limits on state choice-of-law decisions. See *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930) (due process). *John Hancock Ins. Co. v. Yates* (full faith and credit). These limits have been applied only to a State's choice of substantive law,[15] however, and none of the Supreme Court cases cited by defendants give any indication that a choice of procedural law implicates the federal Constitution. See, e.g., *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 313 (1981) (choice of substantive law may be restricted by constitution); see also *Yates* and *Dick*, supra (choice of substantive law limited, despite State's label as procedural).

The Supreme Court has repeatedly approved the constitutionality of the rule that the law of the forum applies for limitations purposes. E.g., *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). But defendants assert that none of the Supreme Court cases upholding application of the traditional rule are dispositive of this case, because none of those cases involved the application of a forum State's longer statute of limitations. Nothing in any Supreme Court case, however, indicates that this should make any difference. Virginia has no statute of repose, as contrasted with a statute of limitations, in favor of the defendants here. Had Virginia such a statute of repose, a better argument might be made. Defendants enjoy no right, then, fundamental or otherwise, in having Virginia's limitations' period applied to them. Therefore, the defendants cannot have been deprived of due process

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[15]The rule was stated by Justice Brennan in *Hague*, infra, at p. 312–13: ". . . for a State's *substantive* law to be selected in a constitutionally permissible manner, that State must have a significant contact. . . ." (Italics added)

on that account by the district court's application of Texas' statute of limitations.

Defendants can claim no surprise at having the Texas statute applied in this case, which was originally filed in Texas. Unfair surprise is at the heart of the due process restrictions on state choices of law, see *Hague* at 326, Justice Stevens concurring, surprise created by an arbitrary choice. It would often be unfair to subject a litigant to the substantive laws of a State with no significant contacts to the litigation, because people are thought to be capable of modifying their behavior in light of the prevailing law. To subject a party's conduct *post hoc* to rules that that party had no reason to expect might apply might truly be unfair. The defendants, though, had every reason to expect that Texas' statute of limitations would be applied to them in an action like this.

It has long been the rule that transitory actions may be filed in any court with jurisdiction over the defendants. An action for personal injury, such as this, is a perfect example of a transitory action. Defendants are bound to have known that by marketing their products in Texas they would subject themselves to the jurisdiction of the Texas courts. And, defendants had no reason to think that, were they sued in Texas, the Texas courts would apply any statute of limitations other than their own. The rule that the law of the forum determines the applicable statute of limitations has a long history in the federal courts,[16] and its application has been widespread. While long usage, by itself, may give little imprimatur to a law challenged as violative of due process, it is most relevant to whether defendants can claim surprise when the rule is applied to them. See *Hague*, at p. 317–318.

Finally, we note that we do not attach the same significance as defendants to the language of the Supreme Court in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). The full extent of the Court's commentary on the traditional conflicts rule is as follows:

> There has been considerable academic criticism of the rule that permits a forum state to apply its own

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[16]See, e.g., *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839).

> statute of limitations regardless of the significance of contacts between the forum state and the litigation. [Citations omitted] But we find it unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation.

Id. at 778 n. 10.

Defendants characterize this as a warning that the traditional rule is ripe for reconsideration. The most we can say, however, is that it indicates that the precise question has not yet been addressed by the Supreme Court. We take the language as we find it, that the Court has expressed no opinion on that matter.

In sum, our opinion is that the rule as applied here does not violate either the due process or full faith and credit clauses of the Constitution. We think the district court correctly followed the mandate of *Klaxon*, that its "... proper function ... is to ascertain what the state law is, not what it ought to be," 313 U.S. at 497, and the concurring opinion of Justice Stevens in *Hague* that "[i]t is not ... [the Supreme] Court's function to establish and impose upon state courts a federal choice-of-law rule. ..." 449 U.S. at 332.

The order of the district court is accordingly

AFFIRMED.[17]

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[17] In accord with this opinion are *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir. 1987), and *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979). Contra, *Ferens v. Deere & Company*, 819 F.2d 423 (3d Cir. 1987), over a dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

WILEY GOAD, ET AL.,

Plaintiffs

v.

JOHNS-MANVILLE SALES
CORP., ET AL.,

Defendants

Civil Action No. 84-0500-R

ORDER
CIV.O.B. #104, p. 153

On February 3, 1986, this Court entered an Order granting Plaintiffs' motion that the statute of limitations of the State of Texas be applied to this case. This Order was entered without benefit of oral argument by counsel, and subsequent to the Order, counsel for the Defendants requested oral argument on the issues presented by the briefs. The request was granted, and oral argument was heard on February 17, 1986.

One of the reasons for granting oral argument after the Court had already rendered a decision on this motion was a decision by the United States District Court for the Eastern District of New York which had not been included in the Defendants' brief, but had come to the attention of the Defendants subsequent to their filing of their brief in opposition to the motion. The decision from the Eastern District of New York is entitled "In re Eastern District of New York Asbestos Litigation MF-1 Rendered on the 25th day of January, 1986." The New York decision is in apparent conflict with the decision from the Southern District of Alabama on which I relied in my ruling on this motion.

Although I do not find the decision from the Eastern District of New York nor the very able arguments of defense

counsel sufficiently persuasive to change my initial decision as set forth in the February 3 Order. I do think they are sufficient to justify an interlocutory appeal of this ruling. Thus, in accordance with 28 U.S.C. § 1292(b), I find that the Plaintiffs' motion to apply the Texas statute of limitations involves a controlling question of law as to which there is substantial grounds for difference of opinion, and that immediate appeal will materially advance the ultimate termination of litigation.

Although I feel an interlocutory appeal is appropriate, I do not believe a stay of the proceedings pending the appeal is justified. Therefore, Defendants' request for a stay pending interlocutory appeal is DENIED.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTER this 20th day of February, 1986.

/s/ JACKSON L. KISER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

WILEY GOAD, ET AL.,

Plaintiffs

v.

JOHNS-MANVILLE SALES
CORP., ET AL.,

Defendants

Civil Action No. 84-0500-R

ORDER
Civ. O. B. #104, p. 6

This case was originally filed in the United States District Court for the Eastern District of Texas. There was no substantial question that that Court had both personal and subject matter jurisdiction, and that the venue was proper. On motion of the Defendants, the case was transferred to this Court pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties.

This case is now before this Court on the Plaintiffs' motion to apply the Texas statute of limitations. Defendants oppose the motion, mainly on constitutional grounds, and assert that the Virginia statute of limitations is the appropriate one. The parties have briefed their respective positions in some detail, and have fully set forth the pertinent precedent in support of their arguments. I am of the opinion that the Plaintiffs' position is the correct one.

There is no need for me to analyze the arguments of the parties because I agree with Judge Hand of the Southern District of Alabama who very ably addressed the same arguments set forth here in his decision in *Asbestos Litigation Transfers from Northern District of Texas Applicability of*

Statute of Limitations, which was handed down on January 3, 1986.

The only observations which I would add to Judge Hand's scholarly analysis of the problem are historical considerations which arise from common law pleading and practice. At common law, a distinction was made between transitory and local actions. The common law courts widely held that a transitory action could be filed in any jurisdiction where the Defendant could be found (found in the sense he was amenable to personal service of process). This was true even though no portion of the cause of action may have arisen in the jurisdiction of the forum. On the other hand, local actions could be filed only in the forum where the cause of action arose. The classic example of the transitory cause of action was one for personal injury. *See* 1A Mich. Jur. Actions § 10.

I think the distinction is important in considering the Defendants' due process argument. It seems to me that this distinction would have been in the minds of the drafters of the Constitution when the phrase "due process" was first inserted into the Constitution in the Fifth Amendment and later in the Fourteenth Amendment.

Clearly, the cause of action here is a transitory one which could be brought against the Defendants any place they could be found, and they were found in Texas. It is also just as clear that the Texas court had the jurisdiction and venue to entertain this case, and had it retained the case, the Texas statute of limitations would have been applied.

Accordingly, the Plaintiffs' motion to apply the Texas statute of limitations is GRANTED.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTER this 3rd day of February, 1986.

/s/ JACKSON L. KISER
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

ASBESTOS LITIGATION
TRANSFERS FROM NORTHERN DISTRICT OF TEXAS
APPLICABILITY OF TEXAS STATUTE OF LIMITATIONS

ORDER

This cause is before the Court on plaintiffs' motion to apply the Texas statute of limitations in those actions transferred from the Northern District of Texas. The plaintiffs, Alabama residents, filed their suits in the Northern District of Texas seeking damages for personal injuries caused by exposure to asbestos-containing products manufactured by the various defendants. Upon motion of the defendants, these actions were transferred to the Southern District of Alabama pursuant to 28 U.S.C. § 1404(a) which provides for transfer to another district court for the convenience of the parties and witnesses.

In support of this motion, plaintiffs rely particularly upon the landmark United States Supreme Court decision of *Van Dusen v. Barrack*, 376 U.S. 612, 84 S. Ct. 805, 11 L.Ed.2d 945 (1964) which held that when, upon a defendant's motion, a case is transferred from one federal court sitting in diversity to another pursuant to 28 U.S.C. § 1404(a), "the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue." 376 U.S. at 639. As applied to the case at bar, plaintiffs contend that the District Court for the Northern District of Texas, employing Texas conflict of law rules, would have applied the Texas statute of limitations to these actions and, therefore, this Court as the transferee court must also apply the Texas statute of limitations.

Plaintiffs correctly note that the District Court for the Northern District of Texas would be obligated to apply the conflicts of law principles of Texas, the state in which it sits. *Klaxton Co. v. Stentor Electrical Manufacturing Co.*, 313

U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941); *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538 (11th Cir. 1983). Plaintiffs then contend that the District Court for the Northern District of Texas, employing Texas conflicts of law rules, would have applied the Texas statute of limitations because "when confronted with a lawsuit in which the substantive law of another jurisdiction is to be applied, Texas courts will most often apply their own state's statute of limitations . . . based on the theory that the foreign jurisdiction's statute of limitations is most often part of its procedural, rather than substantive law." *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1111 (5th Cir. 1981), and it has long been held by Texas courts that "matters of remedy and of procedure are governed by the laws of the state where the action is sought to be maintained," *California v. Copus*, 158 Tex. 196, 309 S.W.2d 227, 230, cert. denied 356 U.S. 967, 78 S. Ct. 1006, 2 L.Ed.2d 1074 (1958); *Culpepper v. Daniel Industries, Inc.*, 500 S.W.2d 958 (Tex. Civ. App. 1973).

Upon review of the extensive briefs filed by the parties relative to this motion, the Court finds that the defendants never dispute the above contentions of the plaintiffs but, rather, attack the applicability of the Texas statute of limitations on the following grounds: 1) The Alabama statute of limitations is an integral part of the Alabama substantive law on products liability and these cases, therefore, fall within the exception to the general principle enunciated in *Ellis v. Great Southwestern Corp., supra*, and 2) Application of the Texas statute of limitations in these cases would violate the due process and full faith and credit clauses of the United States Constitution in view of the absence of any significant contacts between this litigation and the State of Texas.

I. Procedural v. Substantive Law Challenge

Relative to the defendants' first ground, the exception in *Ellis* sought to be relied on by the defendants is stated as follows:

> [W]hen the foreign jurisdiction's statute "creates a right and also incorporates a limitation upon the

> time within which the suit is to be brought . . . the limitation qualifies the right so that it becomes part of the substantive law rather than procedural, and . . . unless suit is brought within the time allowed by [the foreign state's] statute no right of action can be maintained even though the law of [Texas] provides for a longer period of limitations."

646 F.2d at 1111, quoting *California v. Copus*, 158 Tex. 196, 201, 309 S.W.2d 227, 231, cert. denied, 356 U.S. 967, 78 S. Ct. 1006, 2 L.Ed.2d 1074 (1958). Defendants argue that the statute of limitations provision, Ala. Code § 6-5-502 (1975), contained in Alabama's Products Liability Act, Ala. Code § 6-5-500, *et seq* (1975), is an integral part of the substantive provisions of the Act itself and that, consequently, the Texas statute of limitations is inapplicable in the present cases.

Plaintiffs correctly point out, however, that the Alabama Supreme Court in *Lankford v. Sullivan, Long and Hagerty*, 416 S.2d 996 (Ala. 1982) held § 6-5-502(c) of the Alabama Products Liability Act to be unconstitutional. Consequently, Division 1 of the Alabama Products Liability Act, including § 6-5-500, 501 and 502, were rendered void pursuant to § 6-5-504 which reads:

> It is expressly provided that each section, clause, provision or portion of this division shall be construed as inseparable and nonseverable from all others, and in the event that any section, clause, provision or portion of this division shall be held invalid or unconstitutional by any court of competent jurisdiction, the entire division and each section, clause, provision or portion thereof shall be inoperative and have no effect.

Ala. Code § 6-5-504 (1975). See also, *Daniel v. Heil Company, Inc.*, 418 S.2d 96, 97 (Ala. 1982) ("Section 6-5-502, et seq., Ala. Code 1975 were declared unconstitutional by this court in *Lankford*.")

Plaintiffs also correctly point out that, in the absence of § 6-5-502, the only statutes of limitations which could apply to

these asbestos personal injury actions are § 6-2-38,[1] as amended in 1984, and § 6-2-30(b), enacted in 1980. Both § 6-2-38 and § 6-2-30(b) are found within a division of the Alabama Code which deals exclusively with limitation periods and, therefore, neither of these provisions fit within the *Ellis* exception relied on by defendants as neither are contained within a statute which "creates a right and also incorporates a limitation upon the time within which the suit is to be brought." *Ellis*, 646 F.2d at 1111. Consequently, both § 6-2-38 and § 6-2-30(b) would be deemed procedural by the Texas courts and the Texas statute of limitations would be deemed to take precedence under the reasoning of *Ellis*, *Copus* and *Culpepper*, *supra*, even though the substantive law which also governs the cases may differ.[2] This Court is obliged, therefore, to apply the Texas statute of limitations as would the District Court for the Northern District of Texas.

II. *Constitutional Challenge*

Relative to the defendants' second ground, defendants assert the unconstitutionality of applying the statute of limitations of a state such as Texas which has no significant connection with the litigation. Defendants emphasize the often unfavorable consequences of forum shopping and specifically assert violations of the due process and full faith and credit clauses of the United States Constitution.

As the plaintiffs correctly counter, there is no authority to the effect that the full faith and credit clause limits a forum state's selection of its own statute of limitations as applicable to a foreign substantive right. In fact, the Supreme Court clearly held in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514,

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[1]Plaintiffs inadvertently referred to § 6-2-39 which was repealed effectively January 9, 1985 and replaced by amended § 6-2-38 in 1984.

[2]Defendants' attempt to construe §§ 6-2-30 and 6-2-38 together with §§ 6-5-520-525 to create a substantive bar to plaintiffs' right of action is untenable as §§ 6-5-520-525 fall within Division 2 of Alabama's Product Liability Act, entitled "Mitigation of Recoverable Damages," and are not amenable to the analysis used in *Alabama Great So. R.R. Co. v. Allied Chemical Corp.*, 467 F.2d 679 (5th Cir. 1972).

73 S. Ct. 856, 97 L.Ed. 1211 (1953) that "the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state." 345 U.S. at 517.

Defendants' due process argument must also fail. The cases relied upon by defendants for the proposition that a particular state's statute of limitations can be applied constitutionally only if that state has a significant contact or significant aggregation of contacts thereby creating a state interest have been misinterpreted and/or misapplied by said defendants. For example, in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 101 S. Ct. 633, 66 L.Ed.2d 521 (1981), the Supreme Court clearly states:

> [F]or a State's *substantive law* to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

449 U.S. at 313 (emphasis added). The Supreme Court thus explicitly directs the due process and full faith and credit analysis only to the choice of applicable substantive law, not procedural law.[1]

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[1]Likewise, defendants' reliance on the following cases is unwarranted. *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966), which cited *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945), addressed only the constitutional propriety of an Alabama federal court exercising personal jurisdiction over Mississippi defendants. *Home Insurance Co. v. Dick*, 281 U.S. 397, 50 S. Ct. 338, 74 L.Ed. 926 (1930) addressed the choice of substantive law, not procedural law. *John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178, 57 S. Ct. 128, 81 L.E.D. 106 (1936) deals not with a statute of limitations but with an erroneous finding that an evidentiary rule prevailed over a rule of substantive law in like manner as would the Alabama's Products Liability Act (§ 6-5-500 et seq., particularly § 6-5-502) have prevailed over the Texas statute of limitations in the cases at bar had such statute not been declared unconstitutional by the Alabama Supreme Court. *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L.Ed. 2079 (1945), although indicating that, under its particular facts, a distinction between substantive and procedural law was immaterial, clearly adopted the position that "it would be a mischievous practice to disregard state statutes of limitation whenever

Defendants also contend that in *Keeton v. Hustler Magazine, Inc.*, ____U.S. ____, 104 S. Ct. 1473 (1984), the Supreme Court "expressly left undecided" the question regarding the constitutionality of applying New Hampshire's statute of limitations merely because only the issue of personal jurisdiction was presented. Defendants rely greatly on an excerpt in which the *Keeton* court notes "[t]here has been considerable academic criticism of the rule that permits a forum state to apply its own statute of limitations regardless of the significance of contacts between the forum state and the litigation." 104 S. Ct. at 1480, n.10. The Supreme Court's awareness of the existence of academic criticism, however, does not demonstrate an inclination to change the present status of the law which the Supreme Court clearly states is that "under traditional choice of law principles, the law of the forum state governs on matters of procedure. See Restatement (Second) of Conflicts of Laws § 122 (1971)." 104 S. Ct. at 1480, introductory sentence of n.10. The Supreme Court, in fact, appears disinclined to alter the present status as evidenced by the following:

> The chance duration of statutes of limitations in non forum jurisdictions has nothing to do with the contacts among respondent, New Hampshire, and this multistate libel action. Whether Ohio's limitations period is six months or six years does not alter the jurisdictional calculus in New Hampshire. Petitioner's successful search for a state with a lengthly statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations. Certainly, Hustler Magazine, Inc., which chose to enter the New Hampshire market can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor or other commercial partner.

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federal courts think that the result of adopting them may be inequitable." 326 U.S. at 111 (citations omitted).

104 S. Ct. at 1480. This dicta merely reiterates the long standing position of the Supreme Court on this issue as illustrated in *Van Dusen V. Barrack, supra:*

> We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms.

376 U.S. at 636-37, referring with approval to the A.L.I. Study of the Division of Jurisdiction between State and Federal Courts (Tent. Draft No. 1, 1963) which provided, in pertinent part;

> The effect [of applying the choice of law rules of the transferor state] is to give the plaintiff the benefit which traditionally he has had in the selection of a forum with favorable choice-of-law rules. . . . It may be thought undesirable to let the plaintiff reap a choice-of-law benefit from the deliberate selection of an inconvenient forum. In a sense this is so, but the alternatives seem even more undesirable.

376 U.S. at 637, n.36. It is clear, therefore, that plaintiffs' choice of a Texas forum, even if calculated to circumvent a probable dismissal of their actions in the very court before which they now stand, is constitutionally permissible. Federal constitutional law does not preclude application of the Texas statute of limitations.

Accordingly, it is hereby ORDERED that plaintiffs' motion to apply the Texas statute of limitations in those actions transferred from the Northern District of Texas pursuant to 28 U.S.C. § 1404(a), be and the same is, GRANTED.

DONE this 3rd day of January, 1986.

/s/ W. B. HAND
Chief Judge

NO. 87-1183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CELOTEX CORPORATION; EAGLE-PICHER INDUSTRIES, INC., OWENS-CORNING FIBERGLASS CORPORATION; KEENE CORPORATION; H.K. PORTER COMPANY, INC.; FIBREBOARD CORPORATION,

Petitioners,

v.

WILEY GOAD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 12, 1988

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NO. 87-1183

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

CELOTEX CORPORATION, et al.

Petitioners,

v.

WILEY GOAD,

Respondent.

BRIEF IN OPPOSITION OF RESPONDENT WILEY GOAD

In the usual course, we would, on behalf of Respondent Goad, vigorously oppose certiorari in this case. The decision of the Fourth Circuit is clearly right and consistent with an unbroken line of decisions from this Court going back to 1839 as well as with what has been regarded as settled law by courts throughout the land.

Even the contrary decision of the Third Circuit in *Ferens v. Deere & Co.*, 819 F.2d 423 (3d Cir. 1987), *petition for certiorari pending*, No. 87-477, would not alter the fact that this case is not worthy of certiorari. There is a square conflict between the decision below in this case and that in *Ferens*. Indeed the Fourth Circuit made it clear in note 17 of its opinion, 831 F.2d at 514 (A-10), that it was not following the divided decision of a panel of the Third Circuit. That two judges of the Third Circuit saw fit to write into the

Constitution their own notions on what they think would be wise conflicts-of-laws policy is hardly reason for this Court to hear a case. Either *Ferens* should be summarily reversed or perhaps left to dangle in the wind as the derelict it so clearly is.

The situation is changed only because the Court has already agreed to hear *Sun Oil Co. v. Wortman*, No. 87-352, *certiorari granted* 108 S.Ct. 256 (1987). We understand that the *Sun Oil* case is scheduled for argument on March 22, 1988.

The views of Respondent Goad have already been set out in an amicus curiae brief in *Sun Oil*, dated January 19, 1988. As we explain at some length there, the issue in *Sun Oil* is certainly similar to that in the present case, but the two issues are not the same. If this Court should affirm the holding of the Kansas Supreme Court in *Sun Oil* with regard to the statute of limitations, a similar result in our case is *a fortiori*. But if the Court should reverse in *Sun Oil*, it does not follow that there must be reversal here. There is considerable difference between a suit by royalty owners to recover money, which could have been brought at any time, and a personal injury case such as Goad's, in which application of the Virginia statute of limitations arguably means that his claim for damages for the terrible harm done him was barred by limitations before he knew or could have known that he had a claim. Even if the Constitution should suddenly be found to restrain a forum state from applying its own statute of limitations in the circumstances of the *Sun Oil* case, the Constitution should not be held a draconian bar where basic considerations of fairness argue against depriving an injured person of any day in court. See, for example, the views of the National Conference of Commissioners on Uniform State Laws, set out at pages 28-29 of our amicus brief.

The Court may, therefore, wish to defer action on the petition for certiorari in the present case until *Sun Oil* has been decided. If that case is affirmed, either summary affirmance or denial of certiorari would seem appropriate for the present case, with *Ferens* either summarily reversed or remanded to the Third Circuit for reconsideration in the light of *Sun Oil's* reminder that the Constitution does not reflect every changing fancy of the conflicts scholars. If *Sun Oil* should be reversed on the statute of limitations issue, presumably the present case should be remanded for reconsideration by the Fourth Circuit in the light of that decision.

It may be that the Court will wish to have before it the full range of possibilities concerning the Constitution and statutes of limitations at the time it hears *Sun Oil*. If that is its preference, it would seem desirable to grant certiorari in the present case and hear argument in the two cases in tandem. There is no reason why consolidation need cause delay. For our part, if consolidation should be ordered, we are prepared to file our brief on the merits within seven days after receipt of the brief of Petitioners.

Respectfully submitted,

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No. 87-1183

IN THE

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OCTOBER TERM, 1987

CELOTEX CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; OWENS-CORNING FIBERGLAS CORPORATION; KEENE CORPORATION; H.K. PORTER COMPANY, INC.; FIBREBOARD CORPORATION,

Petitioners,

v.

WILEY GOAD,

Respondent.

REPLY MEMORANDUM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY MEMORANDUM

Respondent contends, Br. in Opp., at 2, that the Court could sustain the Sun Oil Company's constitutional challenge to Kansas's application of its statute of limitations at issue in *Sun Oil Company* v. *Wortman*, No. 87-352 (argued Mar. 22, 1988), without necessarily reversing the decision below in this case. Respondent's contention is supported only by a cross-reference to, and incorporation of, his *amicus curiae* brief filed in *Sun Oil*. That brief, however, and the briefs filed by the parties in *Sun Oil*, by and large ignore what petitioners submit is the central question presented by both cases: under what circumstances, if any, may a "forum" state—consistently with the Constitution—apply its statute of limitations to litigation with which its contact consists solely of the defendant's amenability to service of process in that state. As the analysis below demonstrates, Texas has no power to apply its statute of limitations in this case. Furthermore, this analysis produces a bright-line rule which bears no exception such as that suggested by respondent.

I

THE NATURE OF THE RESPECTIVE RIGHTS OF PETITIONERS AND RESPONDENT

The fundamental issue in the case at bar involves the *power* of the Texas legislature to prescribe a statute of limitations for this diversity action, which was brought by respondent in a federal district court in Texas for the sole purpose of enabling respondent "to gain application of the Texas statute of limitations."[1]

[1] *See* Brief *Amicus Curiae* of Wiley Goad in Support of Respondents in *Sun Oil Company* v. *Wortman*, No. 87-352, at 27 ("Amicus Brief").

Petitioners do not challenge the power of Texas to determine, in its discretion, the *maximum* time period during which litigants may bring civil actions in its courts. Nor do petitioners challenge the power of Texas to make its courts generally available to nonresident litigants, such as respondent, whose claims have no connection with Texas other than the fact that the defendants, as here, are constitutionally amenable to service of process in Texas. If, however, Texas determines to foster such unconnected litigation in its courts, Texas must do so subject to federal constitutional restraints.

Whether Texas may constitutionally exercise this general power in this case does not turn, as respondent argued to the court below and as that court saw it, on the characterization of the pertinent Texas (or Virginia) statute of limitations as "procedural" or "substantive." Rather, the resolution of petitioners' constitutional claim turns on whether there is any principled constitutional distinction between the "right" Texas has attempted to confer on respondent and the right which this Court held could not be extended to nonresident plaintiffs by Kansas in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

A. *Shutts* from the Perspectives of the Litigants and the State

In *Shutts*, the Court held that the absence of any constitutional interest of Kansas in claims of nonresidents unrelated to Kansas except for the legal presence of the defendant in Kansas rendered Kansas's attempt to confer legal rights on those nonresidents "sufficiently arbitrary and unfair as to exceed con-

stitutional limits." *Id.*, at 822 (footnote omitted). The holding of *Shutts* can best be explained and applied to the case at bar by viewing it from the separate perspectives of the litigants and the state itself.

Viewed from the standpoint of the nonresident plaintiffs, *Shutts* held that those plaintiffs could not invoke Kansas law to gain an advantage over the defendant because neither those plaintiffs nor their claims had sufficient constitutional contact with Kansas. In other words, those nonresident plaintiffs had no contact with Kansas sufficient to permit them to invoke the apparent benefit of its law even if Kansas desired to extend that benefit to them.

Viewed from the standpoint of the resident defendant, *Shutts* held that the otherwise substantial presence of the defendant in Kansas for the purpose of conducting its business was an insufficient basis upon which to impose on the defendant legal burdens created by Kansas law and projected beyond Kansas's borders to govern disputes between defendant and nonresident plaintiffs. In other words, it was constitutionally unfair for the defendant to have imposed upon it legal obligations respecting transactions with nonresidents which otherwise had no direct connection to Kansas.

Viewed from the standpoint of Kansas, *Shutts* held that a state's generalized interest in regulating the conduct of persons resident or doing business within its borders is an insufficient basis upon which to project the state's powers beyond its borders to transactions otherwise having no connection to that state. In other words, Kansas's regulatory authority stopped at its borders in the absence of any significant state

interest in what, analytically, constituted extraterritorial application of that authority.

Regardless of what the Kansas legislature or its courts might think about the wisdom of the laws of the other jurisdictions with which the nonresident plaintiffs and their claims did have some constitutionally significant contact, Kansas's options under *Shutts* were limited: apply the law of the other jurisdictions no matter how incongruous, or refuse to entertain the claims of the nonresident plaintiffs. *See* note 4, *infra.*

B. *Shutts* Applied to the Case at Bar

Petitioners submit that the legal right, burden and power involved in this case are, for constitutional purposes, indistinguishable from the right, burden and power involved in *Shutts*. This point is, perhaps unwittingly, illustrated by respondent himself. Respondent contends that there is a "considerable difference" between the situation in *Sun Oil* and the situation in this case because application of Virginia's statute of limitations may well bar his claim. Br. in Opp., at 2. By this assertion, respondent makes quite clear that he has a quarrel with a policy of Virginia which he finds uncongenial as applied to his particular circumstances. Respondent therefore asserts a "right" to have his claim adjudicated under Texas law, a "right" which is totally independent of Texas's interest in the orderlyadministration of its court system.[2] The question is whether respondent can show

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[2] That this "right" is personal to respondent and has nothing to do with the administration by Texas of its court system is also illustrated by the fact that in Texas, as is true elsewhere, litigants may waive statutes of limitations. *See, e.g., Franco* v.

that Virginia's policy is constitutionally distinguishable from the policies of Oklahoma, Texas and Louisiana which were elevated over the policy of Kansas in *Shutts*.

Although respondent successfully relied on manipulation of the labels "substantive" and "procedural" in the court below, no label-based approach serves to distinguish respondent's situation from the situations of the nonresident plaintiffs before the Court in *Shutts*: those plaintiffs, as respondent here, purely and simply wanted the law of a state with which they and their claims had no discernible contact to be applied because the law of that essentially foreign state would presumably yield a more favorable result.

The "right" respondent claims has nothing to do with the power of Texas to control the administration of litigation in its court system; it does have to do with the power of Texas to confer legal rights and impose legal obligations beyond its borders. Respondent claims the right to have applied to him the "fair" rule prescribed by Texas rather than the assertedly "unfair" rule fashioned by Virginia. Whatever the constitutional content of the word "procedure" might be, its content is not so elastic as to encompass the personal "right" which respondent would have this Court recognize in him and all similarly situated plaintiffs—a right to scour the Nation in search of a jurisdiction whose statute of limitations breathes new life into a claim that has expired as a matter of the policy of the jurisdiction in which it otherwise could have been maintained. This Court held

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Allstate Insurance Co., 505 S.W.2d 789, 793 (Tex. 1974)); *Allen* v. *Smith*, 129 U.S. 465, 470 (1889).

in *Shutts* that, under similar circumstances, the forum state could not extend the benefits of its laws to nonresidents; this case is no different.

Conversely, petitioners submit that there is no principled basis upon which to distinguish, constitutionally, their plight from that of the defendant in *Shutts*. In *Shutts*, the defendant, a Delaware corporation, was sued in Kansas, where it owned property and conducted substantial business. On that basis, as well as other bases not even arguably present in the case at bar, the Supreme Court of Kansas concluded that Kansas had a constitutionally sufficient interest justifying application of its laws to the defendant. This Court, analyzing those interests, disagreed and reversed. 472 U.S., at 819. The constitutional unfairness of Kansas's assertion of power in *Shutts* was manifest, and that same unfairness is equally obvious in the case at bar.

Finally, the interest of Kansas in regulating the conduct of a person resident in Kansas is surely at least as substantial as any interest Texas may have in imposing on petitioners its statute of limitations. No discernible interest Texas has in the administration of its own court system would be affected by a constitutional barrier to its applying its statute of limitations to this case.

If it was, as the Court held in *Shutts*, "unfair and arbitrary" for Kansas to apply its law to the conduct of a person resident and doing business in Kansas, it is difficult to comprehend how petitioners could not have a justifiable, constitutionally based expectation that they may not be subjected to the vagaries of innumerable statutes of limitations in cases brought in jurisdictions having no connection whatsoever to

them or the litigation other than the presence of petitioners in those jurisdictions. The irreducible teaching of *Shutts* is that a forum state has no power to confer legal rights on nonresident litigants or impose legal burdens on resident defendants absent some substantial state interest in doing so. Where, as here, no state interest in the administration of its court system is present, the statute of limitations established by the state which does have substantial contacts with the parties and the subject matter of the litigation—Virginia—must be applied.

II

THE RELEVANCE OF THIS COURT'S DISPOSITION OF *SUN OIL*

In view of the respective "rights" of petitioners and respondent and the power of Texas to control its court system as discussed above, respondent's assertion that his position could survive a decision of this Court in *Sun Oil* requiring the application of statutes of limitations other than that of Kansas to the claims of nonresidents is without merit. Respondent purports to support this position by asserting that the claims of the plaintiffs in *Sun Oil* "could have been brought at any time," whereas his own claim was probably barred under the law of Virginia. Br. in Opp., at 2.

Respondent's assertion is nothing more than a cryptic rendition of the argument he makes to this Court as *amicus curiae* in *Sun Oil* that the Court should constitutionalize discovery rules in the "latent injury context" even if the Court were to sustain the position of the Sun Oil Company in *Sun Oil*.[3]

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[3] Amicus Brief, at 27-28.

Respondent's argument to the Court in *Sun Oil* proposes the recognition of a constitutional distinction between plaintiffs possessing contract (and presumably all other) claims and plaintiffs possessing "personal injury" claims, with the former being constitutionally chargeable to discover their claims while the latter should not be. Although the legislatures of the several States are constitutionally free to recognize such a distinction and apply it to litigants and cases with which they have a substantial connection, there is nothing in the nature of those rights of action which supports the constitutional distinction respondent implicitly urges in his Opposition and argues more fully in *Sun Oil*.

Indeed, respondent's argument on this point merely illustrates that the case at bar has *nothing* to do with the manner in which Texas administers its court system and has *everything* to do with the respective powers of Virginia and Texas to establish the legal rights and burdens to be enjoyed and borne by the parties to this case.[4] If Sun Oil's challenge to the application

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[4] Under petitioners' submission, and contrary to respondent's argument, Amicus Brief, at 10-11, whether the state having substantial contacts with the litigation would, as a matter of policy, choose to have its pertinent statute of limitations applied by a "forum" state such as Texas is irrelevant, as is the related, somewhat more abstract question whether that "non-forum" state would regard its statute of limitations as "substantive" or "procedural." Texas's charactaization of its statute of limitations is also irrelevant, because Texas may constitutionally apply its statute of limitations to this case solely in furtherance of a concrete interest in the administration of its court system. In short, Virginia's statute of limitations must be applied to this case because the Texas courts would be without power to apply the Texas statute. Here, as in *Shutts*, the Constitution limits

of Kansas's statute of limitations is sustained by the Court, the petition in this case should be granted, the decision below vacated, and the case remanded for further proceedings to determine whether respondent's claims are barred by Virginia's statute of limitations.

April 15, 1988 Respectfully submitted,

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the forum state's options: the Texas courts may refuse to entertain this and similar cases altogether, but they must apply Virginia's statute of limitations as if the case were being litigated in Virginia's courts.